

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Mailing

77-1376
77-1404

To be argued by
DOUGLAS K. MANSFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1376, 77-1404

UNITED STATES OF AMERICA,

—against—

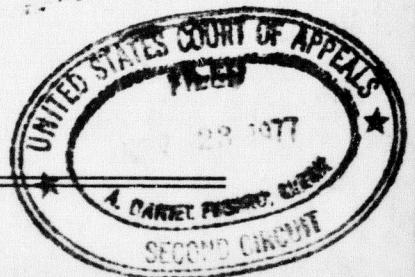
MAXIMINO TORRES and ACQUILES VARGAS,
Appellee,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
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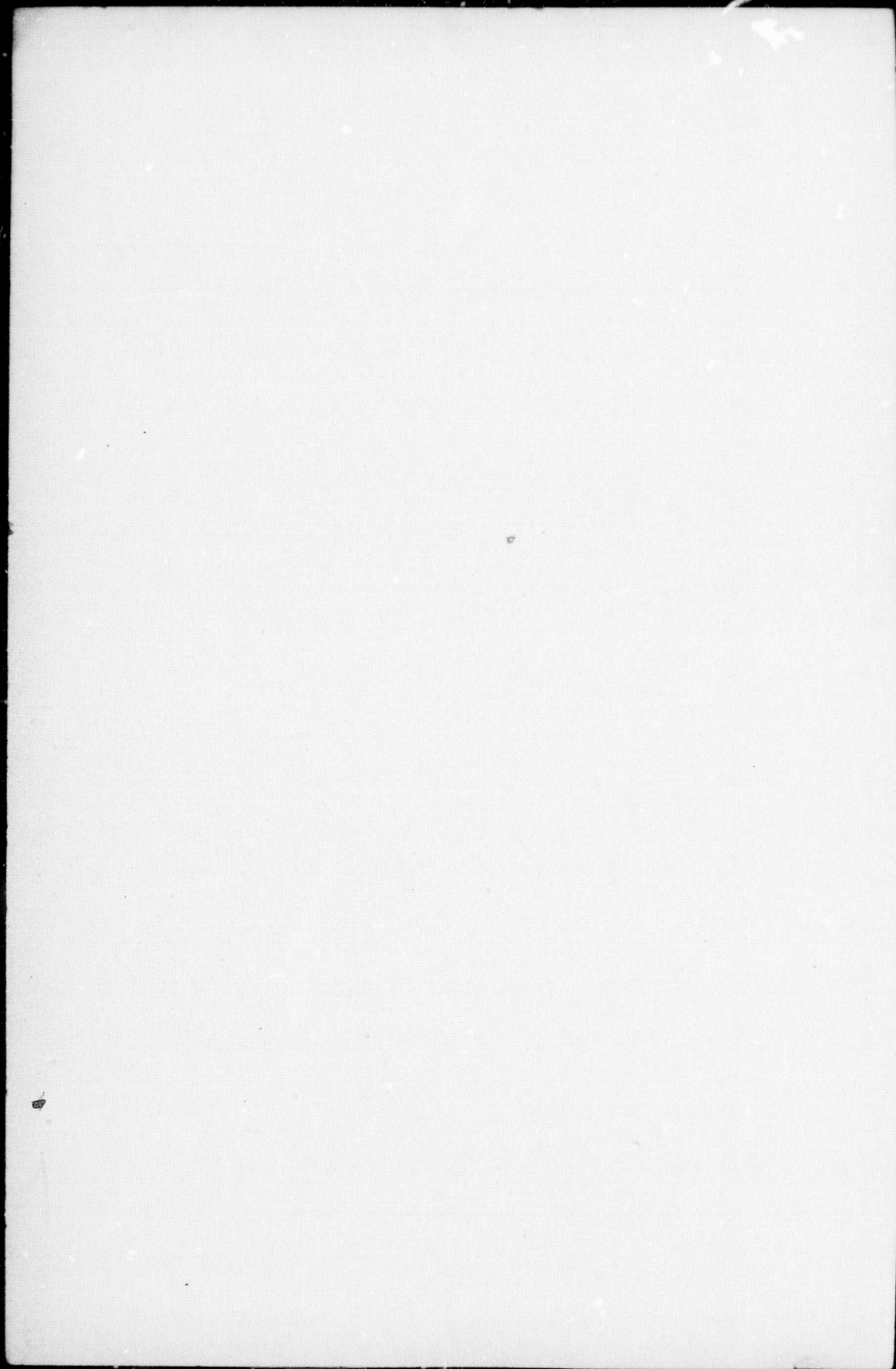


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
POINT I—The surveilling agents had probable cause to search appellants' vehicle	4
POINT II—The record sufficiently supports the infer- ence that Agent Crawford had the requisite knowledge for probable cause	7
POINT III—Appellants' failure to contend at the sup- pression hearing that Agent Crawford's knowl- edge was not sufficient to establish probable cause bars consideration of that issue on ap- peal	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

<i>Brinegar v. United States</i> , 338 U.S. 160, 175-76 (1949)	5
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	4
<i>Chambers v. Maroney</i> , 399 U.S. 42 (1970)	4
<i>Moreno-Vallejo v. United States</i> , 414 F.2d 901, 904 (5th Cir. 1969), <i>cert. denied</i> , 400 U.S. 841 (1970)	8
<i>Texas v. White</i> , 423 U.S. 67 (1975)	4

	PAGE
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir. 1977)	10
<i>United States v. Costello</i> , 381 F.2d 698 (2d Cir. 1967)	6
<i>United States v. DelPorte</i> , 357 F. Supp. 969 (S.D. N.Y.), <i>aff'd</i> , 483 F.2d 1399 (2d Cir. 1973)	8
<i>United States v. Faruolo</i> , 506 F.2d 490, 491 n.2 (2d Cir. 1974)	2
<i>United States v. Gitlitz</i> , 368 F.2d 501 (2d Cir. 1968), <i>cert. denied</i> , 386 U.S. 1038 (1967)	10
<i>United States ex rel. Labelle v. Lavelle</i> , 517 F.2d 750, 753 (2d Cir. 1975), <i>cert. denied</i> , 423 U.S. 1062 (1976)	8
<i>United States v. Magda</i> , 547 F.2d 756, 758 (2d Cir. 1976)	7
<i>United States v. Nieto</i> , 510 F.2d 1118, 1120 (5th Cir.), <i>cert. denied</i> , 399 U.S. 918 (1970)	8
<i>United States v. Rollins</i> , 522 F.2d 160, 165 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 918 (1976)	10
<i>United States v. Rosario</i> , 543 F.2d 6, 8 (2d Cir. 1976)	8
<i>United States v. Santana</i> , 485 F.2d 365 (2d Cir. 1973)	5
<i>United States v. Schwartz</i> , 535 F.2d 160, 163 (2d Cir. 1976), <i>cert. denied</i> , U.S. (1977)	10
<i>United States v. Vasquez</i> , 534 F.2d 1142, 1145 (5th Cir. 1976), <i>cert. denied</i> , — U.S. — (1977) ...	8
<i>United States v. Weldon</i> , 384 F.2d 772 (2d Cir. 1967)	10

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UNITED STATES OF AMERICA,

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—against—

MAXIMINO TORRES and ACQUILES VARGAS,

Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Maximino Torres and Aquiles Vargas appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York on June 27, 1977 upon their pleas of guilty before Judge Thomas C. Platt to Count Two of Indictment 77 CR 203. That count charged each defendant with the possession of approximately 16 ounces of heroin with the intent to distribute said heroin. Appellants were each sentenced to prison terms of five years with special parole terms of ten years. Both appellants were remanded upon their sentencing.

Prior to entering their pleas of guilty, appellants each moved to suppress the heroin which was seized from the glove compartment of the automobile in which they had been riding on March 31, 1977. An evidentiary hearing

was conducted at which the Government adduced evidence to show that the search, which had been made without a warrant, was based upon probable cause. Upon Judge Platt's denial of appellants' motion to suppress, each appellant pleaded guilty. The guilty pleas were taken pursuant to a stipulation by the Government, which was accepted by the court, that appellants' right to appeal the denial of their motion to suppress would be preserved.¹

On this appeal appellants contend that the Government failed to show that the seizing agent knew the facts constituting probable cause and that the collective knowledge of the agents present was insufficient to establish probable cause.

Statement of Facts

Evidence at the suppression hearing revealed the following:

On March 31, 1977, a confidential government informant entered the premises at 467 Pine Street in Brooklyn, New York and, with money supplied by agents of the Drug Enforcement Administration ("DEA"), purchased heroin from one William Rodriguez (Tr. 14, 40, 82).² After the purchase, the informant told the agents, including Agent George Whalen, that he had observed a substantial amount of heroin in the building and that Rodriguez' *modus operandi* would be to sell the additional heroin as quickly as possible to customers coming to the house (Tr. 14-15). This informant had proved to be extremely reliable on multiple occasions in the past (Tr. 15-16, 25).

¹ This is a procedure which has been approved by this Court. *United States v. Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

² References are to pages of the transcript of the suppression hearing.

Later that same day, acting on the informant's information, DEA agents kept 467 Pine Street under continued surveillance. Although they were positioned in several locations, the agents were able to communicate with each other by two-way radio (Tr. 14). Agent Richard Crawford was part of the team taking part in this surveillance and was in a car with Agent Whalen who, as noted above, had already spoken to the informant (Tr. 97).

About two hours after the surveillance began, surveilling agents observed appellants enter 467 Pine Street and then emerge carrying a brown paper bag (Tr. 17-18, 59-61, 81-82). These details were communicated to other agents, including Agents Crawford and Whalen (Tr. 97) by radio (Tr. 62-63). Appellants immediately drove away and were followed by several agents (Tr. 19). During this time, appellants frequently looked behind them (Tr. 20, 98-99), made several quick, unexpected turns (Tr. 33), and followed a circuitous route (Tr. 99-101).

Agents Whalen and Crawford were part of the pursuit and stopped appellants by pulling their car alongside that of the two men. After being stopped Vargas and Torres each produced requested identification (Tr. 22, 102). Agent Crawford then searched the glove compartment of the car and found a brown paper bag containing heroin (Tr. 22, 102), at which point Vargas and Torres were placed under arrest.

At the hearing on the motion to suppress the bag and its contents, counsel for each appellant conceded that the only issue was whether or not there was probable cause for the search (Tr. 6-7). Each attorney directed his arguments solely to the contention that the collective knowledge of the agents was not enough to establish probable cause (Tr. 115-120).

Judge Platt found the agents' testimony to be uncontroverted, and he credited it fully. He also found that "Mr. Chan Rodriguez was known in fact to have sold heroin an hour or so before to a government informant and was further known in fact to have additional heroin on the premises for sale. And it was further known in fact that his practice was to get rid of the same by additional sales as promptly as possible." Judge Platt further found that "the defendants were observed entering emptyhanded and emerging with [what] the Second Circuit has characterized as 'a sort of hallmark of the narcotics business, i.e., the brown paper bag,' *United States* against *Santana*, at p. 45." Finally, the court noted "the circumstances of the pursuit of the defendants in possession of the contraband, and particularly the testimony of the agents with respect to the circuitous route, replete with a U turn and backtracking, and as to the furtive rear view mirror observations of the defendant driver, and the back window inspections by the defendant passenger" (Tr. 129-30).

POINT I

The surveilling agents had probable cause to search appellants' vehicle.

Appellants claim, as they did below, that the search of their automobile was not based upon probable cause.³ We submit that the facts proved before Judge Platt amply support his finding of probable cause.

Probable cause for the search of defendants' vehicle existed if the agents had "a reasonable ground for belief

³ Appellants concede that a warrantless search of an automobile is valid if made upon probable cause. Brief for Appellants at 3-4. *Texas v. White*, 423 U.S. 67 (1975); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

of guilt " *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Here the agents had more than a reasonable ground for such a belief. They knew that there was heroin inside the house at 467 Pine Street and that there was a man inside that house whose desire it was to dispose of that heroin quickly. They also knew that appellants had entered the house and exited shortly thereafter carrying the classic brown bag. Finally, they were able to observe appellants engaging in evasive driving and furtive glances over their shoulders and into the rear-view mirror. Unquestionably, the agents had reasonable ground to believe that the heroin transaction they were anticipating had just taken place. They then had probable cause to stop the vehicle and to search it.

In support of their claim, appellants rely upon *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973). In *Santana*, an officer with the New York Joint Task Force had under surveillance a restaurant which was known by the police to be a meeting place for persons engaged in narcotics activities. Late in the evening, the defendant Santana and a companion were observed to drive up to the restaurant and illegally double-park. Santana and his companion then entered the restaurant and exited one-half hour later carrying a brown paper bag. The officer involved recognized Santana as a person who had been identified in police files as among the top one hundred narcotics traffickers in New York. The officer had also been told by an informant that Santana was heavily engaged in narcotics activities. Santana and his companion next drove to an apartment building nearby, again double-parked the car, and entered the building. Approximately ten minutes later Santana came out of the building carrying another brown paper bag. After Santana re-entered his vehicle, the police officer approached the car and asked to see Santana's license and registration. Santana opened the door, stepped out of the car,

and reached for his wallet, at which point the officer pushed the car door the rest of the way open and stepped between the door and the car. He observed a plastic bag filled with cocaine inside the car. The Government conceded that the officers did not have probable cause to search the car.

Appellants' reliance on *Santana* is misplaced. First of all, the issue of probable cause was never litigated in *Santana*. The search there was upheld on the grounds that the cocaine was in plain view following a justifiable "stop". More importantly, the facts known by the agents in this case were far more probative than those in *Santana*. In *Santana*, the defendant entered a public eating facility with a reputation for narcotics transactions; here the defendants entered emptyhanded into a private dwelling where DEA agents knew that narcotics transactions had just taken place, where a substantial amount of heroin was still located, and where further transactions were likely to take place soon. The fact that heroin was actually known to be present here is the critical difference between this case and *Santana*. Furthermore, the conduct of appellants upon leaving Pine Street—repeated glances behind their car, quick, unexpected turns, a circuitous route—all lend further support to the conclusion that appellants had heroin in the car.

More similar to the facts in this case is *United States v. Costello*, 381 F.2d 698 (2d Cir. 1967). In *Costello*, narcotics agents had learned that one Oliveri was selling narcotics at his cleaning shop. Agent Coursey met Oliveri and Oliveri agreed to sell heroin to Coursey. Coursey brought into the cleaners a sport jacket to be pressed, with cash for the heroin in the pocket. He later returned and picked up the jacket, with the agreed-upon heroin in the pocket. Later, Oliveri agreed to sell Coursey \$4500 worth of heroin. Oliveri was thereafter observed to enter

and ride in a car with Costello and to leave the car and proceed to the cleaners carrying a small brown paper bag. Then Coursey and Oliveri transferred the money and heroin in a manner similar to the earlier transaction. After the transfer, Oliveri left the cleaners carrying a different, larger paper bag, which he delivered to Costello in the car. On the basis of these facts, agents four months later arrested Costello at his apartment. This Court held that the arrest was clearly valid as supported by probable cause. *Id.* at 700.

As in *Costello*, probable cause here hinges on a transfer of a paper bag with someone known to be currently engaged in selling heroin. Here the agents also could rely on the suspicious conduct of appellants as they drove away from Pine Street. The circumstances of this case, viewed through the eyes of reasonable and cautious police officers on the scene, guided by their experience and training, *United States v. Magda*, 547 F.2d 756, 758 (2d Cir. 1976), more than sufficiently support the determination by Judge Platt that there existed probable cause for the search of appellants' automobile.

POINT II

The record sufficiently supports the inference that Agent Crawford had the requisite knowledge for probable cause.

Appellants on this appeal raise for the first time the contention that all the elements of probable cause known by the team of surveillance agents must be shown to have been known by the individual—Agent Crawford—who conducted the search. Specifically, appellants' argue that no showing was made that Agent Crawford knew certain facts: (1) that the informant had purchased heroin in

467 Pine Street that afternoon, (2) that there remained additional heroin in the house, and (3) that it was Rodriguez' *modus operandi* to dispose of his drugs quickly. While such a showing would have specifically been made had appellants raised this objection either in cross-examination or argument below, the record sufficiently supports the inference that Agent Crawford was aware of all the elements supporting the determination of probable cause.

This Court has held that the assessment of probable cause is to be made on the basis of the collective knowledge of the police rather than on that of the acting officer alone. *United States v. Rosario*, 543 F.2d 6, 8 (2d Cir. 1976); *United States ex rel. Labelle v. Lavelle*, 517 F.2d 750, 753 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). While this concept may not apply when the acting officer does not acquire the collective knowledge of the police until after the arrest or search, *United States v. DelPorte*, 357 F. Supp. 969 (S.D.N.Y.), *aff'd*, 483 F.2d 1399 (2d Cir. 1973), it must apply when the acting officer is a component of a unit engaged in a particular ongoing police activity.

Appellants urge that this court not follow the Fifth Circuit, which has held that collective knowledge of the police will be considered as long as there has been "minimal communication" among the officers. *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Nieto*, 510 F.2d 1118, 1120 (5th Cir.), *cert. denied*, 399 U.S. 918 (1970); *Moreno-Vallejo v. United States*, 414 F.2d 901, 904 (5th Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). Although we agree with *Vasquez*, which presumes knowledge where "minimal communication" exists between officer, the facts in this case fully support an inference of knowledge without resort to the *Vasquez* presumption.

Agent Crawford was part of a surveillance team at 467 Pine Street (T. 97). Frequent communication among the surveilling agents was facilitated and carried out by two-way radio (T. 13-14, 17-18, 59, 63-64, 67, 74, 97). A plan was devised whereby an informant arranged to purchase heroin from the occupant of the house. The informant entered the house and purchased the heroin with money supplied by the agents (T.14). Because of the positive results of this plan, surveillance was continued after the informant exited. Although not present at the nearby debriefing of the informant as was Agent Whalen (T. 14), Agent Crawford was in a car with Agent Whalen from a point in time after the debriefing but prior to appellants' arrival, and he remained there until appellants were arrested (T. 97). There was also testimony that the informant's entry into 467 Pine Street and his exit therefrom had been reported over the radio (T. 13-14), and another agent, like Crawford not present at the debriefing of the informant, was aware of Rodriguez' *modus operandi* (T. 78). Finally, Agent Crawford received details of appellants' activities over the two-way radio (T. 97).

It is virtually inconceivable that during the time before the search Agent Crawford was not informed of the results of the informant's purchase, especially because the significance of the continuing surveillance depended to a large extent upon those facts. It is likewise incredible that Agent Crawford was unaware of the planned use of the informant, and therefore did not seek to learn the results of the plan. In short, the use of the collective knowledge of the surveilling agents as a basis for probable cause was justified because of the valid inference from the record that Agent Crawford was privy to the knowledge of the others. This inference is especially valid in view of the appellants' failure to challenge it during the suppression hearing.

POINT III

Appellants' failure to contend at the suppression hearing that Agent Crawford's knowledge was not sufficient to establish probable cause bars consideration of that issue on appeal.

Should this Court find that Agent Crawford's knowledge of all the facts constituting probable cause must be directly shown and that such knowledge cannot be inferred from the record, it should nevertheless find that appellants have waived this argument by not raising it below. "The law in this Circuit is clear that where a party has shifted his position on appeal and advanced arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), *cert. denied*, — U.S. — (1977), and where that party has had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976), waiver will bar raising the issue on appeal." *United States v. Braunig*, 553 F.2d 777 (2d Cir. 1977). This Court has specifically held that in a pretrial challenge to a warrantless search, a probable cause objection will be waived if not explicitly raised. *United States v. Weldon*, 384 F.2d 772 (2d Cir. 1967). The rationale for this rule is that a failure to raise specific objections does not reasonably apprise the trial judge of the grounds of the challenge, *United States v. Gitlitz*, 368 F.2d 501 (2d Cir. 1966), *cert. denied*, 386 U.S. 1038 (1967), and also fails to provide the government with an opportunity to meet the objection, *United States v. Rollins*, *supra*, at 166.

At the suppression hearing in this case, counsel for each appellant had ample opportunity to raise the issue of Agent Crawford's knowledge in extensive cross-examination and argument. Instead, appellants' lawyers accepted Judge Platt's characterization of "probable

cause for the search" as the single issue at the hearing. Both counsel directed their arguments solely to the issue of whether or not the collective knowledge of the agents constituted probable cause. Their shift in position for this appeal constitutes a failure to specify this objection at a time when the "government could have introduced evidence to counter it," *Gitlitz*, 368 F.2d at 504, and thus bars its consideration on appeal.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys,
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* The assistance of Mr. Kenneth J. Melilli in the preparation of this brief is gratefully acknowledged. Mr. Melilli is a second-year student at New York University Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23rd day of November 1977 he served a copy of the within

Brief for the Appellee

r

by placing the same in a properly postpaid franked envelope addressed to:

Charles L. Weintraub, Esq.

1345 Avenue of the Americas

New York, N.Y. 10019

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

23 day of

November 1977

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979